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IN THE

Supreme Court of the United States

No. 495—October Term, 1960

COMMUNIST PARTY, U. S. A., and COMMUNIST
PARTY OF NEW YORK STATE,

Petitioners,

vs.

ISADOR LUBIN, as Industrial Commissioner,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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No. 495—October Term, 1960

COMMUNIST PARTY, U. S. A., and COMMUNIST
PARTY OF NEW YORK STATE,

Petitioners,

vs.

ISADOR LUBIN, as Industrial Commissioner,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Opinions Below

Based upon an official opinion of the Attorney General of the State of New York (Appendix D to Petition, pp. 42-46), the respondent suspended the registrations of the Communist Party, U. S. A. (R. 48-49)* and the Communist Party of New York State (R. 51-52) as employers under the New York State Unemployment Insurance Law (Labor Law, §§ 500 *et seq.*, Consolidated Laws, Chap. 31, Art. 18).†

* References are to pages of Record on Appeal to the Court of Appeals.

† Suspension of registration as an employer results in the exclusion of the employer from the operation of the Unemployment Insurance Law so that it is thereby deprived of the opportunity of affording to its employees the benefits of that law. It is thus gravely handicapped in securing employees.

This determination of the respondent was sustained by the Unemployment Insurance Referee (R. 19-43) and the latter's decision was affirmed by the Unemployment Insurance Appeal Board (R. 11-13).

The Appellate Division of the New York Supreme Court reversed the decision of the Appeal Board and overruled the respondent's suspension of the petitioners' registrations as contributing employers. Its opinion is reported in 8 A. D. 2d 918 (R. 200-203).*

The Court of Appeals of the State of New York reversed the decision of the Appellate Division and reinstated the respondent's determination suspending the registration of the petitioners as employers. Its opinion (DESMOND, C. J.) is reported in 8 N. Y. 2d 77. Judge FULD wrote a dissenting opinion; Judge VAN VOORHIS wrote a concurring opinion.†

Jurisdiction

The grounds on which the jurisdiction of the Court is invoked are set forth in the Petition (p. 2).

Questions Presented

The questions presented are as set forth in the Petition (p. 2).

Constitution, Statutes, Reports, Etc., Involved

Involved in this application are:

U. S. CONSTITUTION:

Preamble, Art. I, § 4, Art. I § 8 Cl. 1, Art. II § 1,
Amendments I, V, X and XIV.

* See Appendix A to Petition, pp. 31-34.

† For all of the opinions see Appendix A to Petition, pp. 19-30.

STATUTES:**Federal**

Communist Control Act of 1954 (50 U. S. Code
 §§ 841 *et seq.*, 68 Stat. 775)*

Subversive Activities Control Act of 1950 (50
 U. S. Code § 781, 64 Stat. 987)*

State

Feinberg Law (L. 1949, ch. 360, § 1)*

Labor Law, §§ 511, 571.

OTHER DOCUMENTS:

Congressional Record (August 16, 1954, p. 13837;
 August 17, 1954, pp. 14079, 14081, 14082, 14088)

Report of U. S. House of Representatives dated
 August 22, 1950 (House Rep. No. 2980, U. S.
 Code Cong. and Admin. News, 1950, p. 3886)*

Attorney General's Opinion

1957 Op. N. Y. Atty. Gen. 239†

Statement

The respondent suspended the petitioners' registrations as employers under the New York Unemployment Insurance Law. Upon the administrative review of this determination the respondent justified his ruling under the provisions of the Communist Control Act of 1954. In establishing a *prima facie* case in the review proceeding, to support his determination, the respondent relied on the doctrine of judicial notice and judicial regard for legislative findings as to the character of the Communist Party as a criminal conspiracy for the overthrow of the Government by force and violence. The petitioners were free to submit such

* See Appendix, *infra*, pp. 22-32.

† See Appendix D to Pétition, pp. 42-46.

evidence as they saw fit to controvert this fact, but failed to avail themselves of the opportunity.

Reasons for Denying Petition for Certiorari

Although it cannot be denied that a Federal and constitutional question is present in this case, the question is one that is merely formal in character, having no substantiality whatsoever, since prior decisions of this Court leave no room for real controversy with respect to any of the points raised by the petitioner. This case does not meet the standard set up by this Court in its Rule 19(1)(a). (See also *Equitable Life Assurance Society v. Brown*, 187 U. S. 308, 310-311, 314-315 [1902]; *Zucht v. King*, 260 U. S. 174 [1922]; *Palmer Oil Corp. v. Amerada Corp.*, 343 U. S. 390 [1952]).

Summary of Argument

The Industrial Commissioner, possessed of the power to suspend the petitioners as employers under New York's Unemployment Insurance Law,* properly exercised that power by reason of the facts:

- (a) That each of the petitioners constitute a criminal conspiracy, the principal object of which is the overthrow of the Government of the United States by force and violence, and that judicial notice could be taken of that fact;
- (b) That any rights, privileges and immunities which the petitioners may have had, including the

* In the performance of his statutory duty to determine the amount of contributions, (i.e., taxes) due from an employer (Labor Law § 571), the Industrial Commissioner has been held to have the power to determine who is an employer within the meaning of the statute (*Matter of Electrolux Corp.*, 286 N. Y. 390, 397 [1941]).

right to be classified as an employer within the meaning of the Unemployment Insurance Law, were terminated by the Communist Control Act of 1954.

Congress had the constitutional power to enact the Communist Control Act and its findings are entitled to great weight. The Act unquestionably affects rights, privileges and immunities granted or created under State Law. It deals not only with such "rights, privileges and immunities," but also with the obligations or duties which are correlative thereto.

Federal inaction under the Act does not impugn its viability nor militate against its legal efficacy.

Although the petitioners, in any event, have no standing to assert any objections to the Act on constitutional grounds, it may nevertheless be clearly demonstrated that the Act is constitutional. Since neither punishment nor retroactivity is involved, it does not constitute either a bill of attainder or an *ex post facto* law. The Act does not violate either substantive or procedural due process, although, if it did, that would not be fatal. Denial is justified under a basic postulate of due process—movements seeking to crush freedom need not be tolerated. There can be no judicial interference with a reasonable legislative judgment of what laws are essential to national security. Nor does the First Amendment serve to invalidate the Act, since the freedoms it guarantees are not absolute but may be restricted to protect other vital interests of the Government which are clearly necessary to the effectuation of proper Congressional power. The Tenth Amendment, too, has no bearing upon this exercise of Congressional power, because Congress acted well within its jurisdiction under the constitutional provisions for the "common defense" and the guaranty to every State of a republican form of government.

ARGUMENT

POINT I

The petitioners do not possess the legal capacity to enjoy any of the rights, privileges and immunities of a legal enterprise.

A. Judicial notice.

None of the parties adduced any evidence whatever, either at the hearings before the Referee or at the hearing before the Appeal Board, as to the character or capacity of the petitioners. Having failed to submit any evidence, as was their right, to controvert the fact that they were a criminal conspiracy, the petitioners are deemed to have waived any objections that they might otherwise have asserted to a determination based upon such premise.

The Commissioner, on the other hand, is in an entirely different position. It was not incumbent upon him affirmatively to adduce evidence on that issue. He could rely completely upon the fact that judicial notice would be taken at all stages of the proceeding of the fact that the petitioners constituted a criminal conspiracy. (*Barenblatt v. United States*, 360 U. S. 109, 127-129 [1959]; *Dennis v. United States*, 341 U. S. 494, 547 [1950]; *American Communications Association, C. I. O. v. Douds*, 339 U. S. 382, 424-433 [1950; concurring opinion of Mr. Justice JACKSON]; *Martinez v. Neelly*, 197 F. 2d 462, 465 [7th Cir., 1952], affd. 344 U. S. 916 [1953]; *Carlson v. Landon*, 187 F. 2d 991, 997 [9th Cir., 1951], affd. 342 U. S. 524 [1952]; *National Maritime Union of America v. Herzog*, 78 F. Supp. 146, 170 [Dist. of Col., 1948], aff'd. 334 U. S. 854 [1948]; *In re McKay*, 71 F. Supp. 397, 399 [N. D. Ind., 1947]; *Matter of Lerner v. Casey*, 2 N. Y. 2d 355, 372 [1957], affd. 857 U. S.

468 [1958]; *Appeal of Albert*, 372 Pa. St. 13, 19-22, 92 A. 2d 663 [1952]; *Pawell v. Unemployment Compensation Board of Review*, 146 Pa. Super. 147, 150-151, 22 A. 2d 43 [1941]).

The petitioners have failed to distinguish between the crime itself and the perpetrator of the crime.* The Courts need no evidence to substantiate the fact that certain acts, by definition, constitute a crime. Thus, the Communist Party, U. S. A., and its subordinates and affiliates on other geographical levels, *in and of themselves* constitute a criminal conspiracy, and no evidence of such fact needs to be adduced. They are a crime, just as burglary and arson, murder and treason are crimes. We are not dealing here with any particular individual who, as a member of the Party, or otherwise, commits "communism".

B. Legislative findings.

Closely akin to the establishment of the character and nature of the Communist Party under the doctrine of judicial notice is the fact that great weight must be accorded

* It is conceded that in denaturalization proceedings (*Nowak v. United States*, 356 U. S. 660 [1958]), disciplinary proceedings against a member of the Civil Service (*Adler v. Board of Education*, 342 U. S. 485 [1952]), proceedings to determine whether an individual possesses the requisite character to merit admission to the bar (*Schware v. Board of Bar Examiners*, 353 U. S. 232 [1957]), criminal proceedings against an individual (*Yates v. United States*, 354 U. S. 298 [1957]), or any other case in which it is sought to establish that an individual is guilty of criminal advocacy of overthrow of the government by force and violence, it is necessary that such fact must be affirmatively established by evidence other than that which may be considered under the doctrine of judicial notice. However, these cases are authority simply for the proposition that the doctrine of judicial notice of the character of the *Party* cannot be employed as a substitute for evidence in any case involving the requirement of proof that a *particular member* of the Party participated in any illegal activity as a member.

to the legislative findings of Congress and of the legislatures of New York and other states with respect to the character and nature of the Communist Party. (See Subversive Activities Control Act of 1950, 50 U. S. Code § 781, 64 Stat. 987, Appendix, *infra*, pp. 22-25; Communist Control Act of 1954, 50 U. S. Code § 841, 68 Stat. 773, Appendix, *infra*, pp. 26-29; Feinberg Law, N. Y. L. 1949, ch. 360, § 1, Appendix, *infra*, pp. 29-30; Report of U. S. House of Representatives dated August 22, 1950 [House Report No. 2980], U. S. Code Cong. and Admin. News 1950, p. 3886, Appendix, *infra*, pp. 30-32).*

C. Their inherent illegality renders them incompetent to exercise any rights, privileges and immunities.

It is apparent from the foregoing that in the absence of evidence to controvert the fact, as is the situation in the case at bar, both the doctrine of judicial notice and the rule that legislative findings must be accorded great weight, establish the fact that the petitioners herein constitute a criminal conspiracy to overthrow the Government of the United States and the Government of the State by force and violence. As such, they are illegal organizations whose illegality permeates every facet of their operations. The illegality is based on the concept of being both constitutionally and morally wrong. In other words, it is *malum in se*. They are constitutionally incapable of an innocent or legal act (*Sprott v. United States*, 20 Wall. 459, 464-465 [1874]).

* See also: *Galvan v. Press*, 347 U. S. 522, 529 (1953); *American Communications Association, C. I. O. v. Douds*, 339 U. S. 382, 391 (1950); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937); *Block v. Hirsch*, 256 U. S. 135, 154 (1921); *Communist Party of U. S. v. Subversive Activities Control Board*, 223 F. 2d 531, 565-566 (App. D. C., 1954), revd. and remanded on another ground, 351 U. S. 115 (1956).

POINT II

Assuming, arguendo, pre-existing legal capacity on their part, nevertheless the petitioners' rights, privileges and immunities were terminated by the Communist Control Act.

Both of the petitioners are proscribed under Section 3 of the Act (50 U. S. Code § 842, Appendix *infra*, p. 27)—the Communist Party of the United States by name, the Communist Party of New York State as one of the latter's "subsidiary organizations". Furthermore, Section 4(b) of the Act (50 U. S. Code § 843 [b], Appendix, *infra*, p. 28), which is *in pari materia* with Section 3, defines the term "Communist Party" as "the organization now known as the Communist Party of the United States of America, the Communist Party of any State or subdivision thereof, and any unit or subdivision of any such organization, whether or not any change is hereafter made in the name thereof."

The petitioners distinguish between the phrase at the beginning of Section 3; "the Government of the United States, or the government of any State, Territory, District, or possession thereof, or the government of any political subdivision therein," (Appendix *infra*, p. 27) and the two phrases at the end of the section dealing with non-entitlement to any rights, privileges, and immunities of bodies created under the jurisdiction "of the laws of the United States or any political subdivision thereof", and termination of rights granted by reason "of the laws of the United States or any political subdivision thereof." The petitioners assert that the wording of the latter two clauses demonstrates Congressional recognition of the distinction between "a political subdivision" and a "State". Petitioners state that a subdivision is "a part of a thing made

by subdividing" and that "the states, of course, were not 'made by subdividing' the nation, but themselves 'made' the United States" (petitioner's brief, p. 9). In other words, as they argued in the Court below, the phrase "political subdivision", as used in the last clause of the section, is a short-hand reference to the federal territories and possessions and the District of Columbia, all of which are "political subdivisions" of the United States.

In the first place it must be observed that even in the absence of other factors which would aid in the process of statutory interpretation, the mere absence of the word "State" in a federal statute does not exclude applicability of the statute to the States (*Case v. Bowles*, 327 U. S. 92, 99 [1946]).

Secondly, it was quite clearly the intent of Congress to include in the last two phrases, in short-hand form, the same political entities as were included in detail in the first phrase. This is apparent from the context of the latter two phrases, in which the political entities referred to are entities having law-making powers. Certainly, the District of Columbia and many of the federal possessions do not have independent or sovereign law-making powers under which corporations may be formed and under which statutory rights, privileges and immunities may arise. Laws for the District and such possessions are enacted directly by Congress. A State, on the other hand, has independent, sovereign law-making powers in the respects stated.

Moreover, the petitioners' analysis, confining the meaning of "political subdivision" in the last clause to the District and federal possessions, is illogical because these, too, were specifically referred to in the first clause. The more logical conclusion would seem to be that in the first clause the words "political subdivision" refer to *local*

governmental units within the States and Territories, while the same words, as used in the last clause, which actually terminates the rights of the Communist Party, include the States.*

According to the argument of the petitioners the Communist Control Act does apply to Alaska and Hawaii because at the time of its enactment they were territories of the United States. Do the petitioners now claim that since these territories have attained statehood the Act no longer applies to them? And if it is admitted that the Act continues to apply to them, what happens to the principle that all States are admitted to the Union upon an equal footing?

It seems obvious, also, from the context of the section, as a whole, that the *laws*, the benefit of which the petitioners have lost, are necessarily the laws of the *governments*, federal, state and territorial which the petitioners seek to overthrow. The fine splitting of hairs, the reliance upon whether the Nation was "made" from the States or vice versa, cannot obscure the intent so clearly expressed in the statute.

* This interpretation is, furthermore, in accord with the congressional intent, as the intent is reflected in the legislative record (100 Cong. Rec. 14079, 14081 [daily ed. August 17, 1954]; *id.*, at 13837 [daily ed. August 16, 1954]; *id.*, at 14082 [daily ed. August 17, 1954]). In the cited pages of the Congressional Record it was stated that the Act would deny the Party a place on the ballot. Since the right to appear on the ballot, whether for State or Federal office, depends on State law (U. S. Const., Art. I, § 4 and Art. II, § 1; *United States v. Gradwell*, 243 U. S. 476 [1917]; 18 AM. JUR., tit. Elections § 9 [1938]), it must necessarily have been the intention of Congress that state-granted rights be included within the proscription of section 3 of the Act.

A. The Communist Control Act deals with "rights, privileges and immunities"; necessarily, it also deals with "obligations or duties" which are correlative to the "rights, privileges and immunities".

The Industrial Commissioner argues, and he has been upheld by the Court below, that whatever rights, privileges and immunities the petitioners may have had were terminated by the Communist Control Act. The dissenting opinion of FULD, J., in the Court below held, and the petitioners here urge, that the requirement to pay an unemployment insurance tax is a liability imposed upon them and not an "immunity or right" within the Act. Of course, in the very nature of the matter an *obligation or duty* to pay a tax cannot be considered a *right, privilege or immunity*. The relevant point involved herein is whether the *right to be a registered employer* was terminated by the Act. The correlative of the right to be an employer in covered employment is the obligation to pay the tax, but the latter is merely the tail which should not be permitted to wag the dog. As well might it be argued that the obligation to pay an income tax is determinative of the right to earn income, or to push the analogy to an even greater extreme, the obligation to pay an estate tax is determinative of the right to pass title by will or descent. (Cf. *Rutkin v. United States*, 343 U. S. 130, 137 [1951]; *Wainer v. United States*, 299 U. S. 92, 93 [1936]; *Angelus Building & Investment Co. v. Commissioner of Internal Revenue*, 57 F. 2d 130, 132 [9th Cir., 1932], cert. den. 286 U. S. 562; *State ex rel. Replogle v. Joyland Club*, 124 Mont. 122, 220 P. 2d 988, 999 [1950]; *State v. Israel*, 124 Mont. 152, 220 P. 2d 1003, 1011 [1950]; *Commonwealth ex rel. Gilmer v. Smith*, 193 Va. 1, 68 S. E. 2d 132, 136 [1951]; *Stein v. State Tax Comm.*, 266 Ky. 770, 115 S. W. 2d 443, 445 [1936]; *Lueke v. Mescall*, 272 Ky. 770, 115 S. W. 2d 358 [1938]).

It seems obvious that the essential test determining taxability is the prerequisite of coverage of the employer under the Unemployment Insurance Law; coverage cannot arise simply upon the basis of payment of the tax. It follows that although the Act does not affirmatively relieve the petitioners of a tax liability, it destroys a status upon which the tax liability depends.

POINT III

The Communist Control Act is constitutional.

A. Congress had the constitutional power to enact the Communist Control Act.

The Communist Control Act is founded on a much broader, much firmer, and more relevant base than control of interstate commerce. The Federal Government, through Congress, has a constitutional right to act, not only in its own behalf, but also in behalf of the several States. Congress has the power to provide for the common defense (Const., Art. I, Sec. 8, Cl. 1; see also, the Preamble to the Constitution) and is under the duty to implement the guarantee to every State of a republican form of government. (*Dunne v. United States*, 138 F. 2d 137, 140 [8th Cir., 1943], cert. den. 320 U. S. 790 [1943]; *Farmer v. Rountree*, 149 F. Supp. 327, 329 [M. D. Tenn., 1956], affd. 252 F. 2d 490, 491 [6th Cir., 1958], cert. den. 357 U. S. 906 [1958]; *United States v. Peace Information Center*, 97 F. Supp. 255, 261 [Dist. of Col., 1951]; *Oil Workers International Union v. Elliott*, 73 F. Supp. 942, 944 [N. D. Texas, 1947]; *Teget v. Lambach*, 226 Iowa 1346, 1350, 286 N. W. 522 [1939]; *Commonwealth v. Nelson*, 377 Pa. St. 58, 69, 104 A. 2d 133 [1954], affd. 350 U. S. 497 [1956]).

Aside from the question of constitutional capacity to enact a law such as that involved herein, it should be noted that the right so to act is without constitutional limitation, is considered political in nature, and is not judicially reviewable (*Ohio v. Akron Park District*, 281 U. S. 74, 79-80 [1930]; *Highland Farms Dairy v. Agnew*, 300 U. S. 608, 612 [1937]; *Farmer v. Rountree, supra*).

The Tenth Amendment (reserved power of the States) does not impose any limitations on the powers of the Federal Government (*Case v. Bowles*, 327 U. S. 92, 101-102 [1946]; *Fernandez v. Wiener*, 326 U. S. 340, 362 [1945]; *United States v. Darby*, 312 U. S. 100, 123-124 [1941]). It merely gives doctrinal body to an objection that Congress has no power to act at all in certain areas. It "states but a truism that all is retained which has not been surrendered" (*United States v. Darby, supra*). Thus, if Congress has power to act in a given area, no valid objection can be raised because of the fact that it thereby enters a field which ordinarily has been regulated by the States (*Case v. Bowles, supra*; *Bowles v. Willingham*, 321 U. S. 503, 521-523 [1944, concurring opinion of Mr. Justice RUTLEDGE]; *United States v. Darby, supra*, at pp. 114, 123-124; *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146, 156 [1919]).

B. The Act does not reconstitute a bill of attainder or an *ex post facto* law.

A bill of attainder is generally described as a legislative act which imposes punishment upon a named individual or an easily ascertainable group without a judicial trial (*United States v. Lovett*, 328 U. S. 303, 315 [1946]; *Cummings v. Missouri*, 4 Wall. 277, 323 [1867]). The *ex post facto* provision of the Constitution forbids penal legislation which imposes or increases criminal punishment for conduct law-

ful previous to its enactment, but does not apply to legislation imposing civil disabilities (*Harisiades v. Shaughnessy*, 342 U. S. 580 [1952]).*

The deprivations provided for in the Act do not constitute punishment since the legislation does not evince a penal intent. True it is that the statute imposes certain civil disabilities, but not all imposition of disability constitutes punishment. This Court recently held that whether a statute is a bill of attainder depends upon the purpose of the statute. (*Trop v. Dulles*, 356 U. S. 86, 96 [1958]. See also *Flemming v. Nestor*, 363 U. S. 603, 613-616 [1960] and *DeVeau v. Braisted*, 363 U. S. 144, 160 [1960]). It is quite clear from the "Findings and Declarations of Fact" which are expressly set forth in the Act (50 U. S. Code § 841, 68 Stat. 775), that the purpose of Congress in enacting this legislation was to draw the fangs of this "agency of a hostile foreign power" whose existence was "a clear and present danger to the security of the United States."

Furthermore, assuming, *arguendo*, that the disqualification was based on the legislature's implicit determination of culpability, recent cases require that the proscription have retroactive application in order to constitute punishment. (See *Garner v. Board of Public Works*, 341 U. S. 716 [1951]; *American Communications Association, C. I. O. v. Douds*, 339 U. S. 382, 413-414 [1950]; *Albertson v. Millard*, 106 F. Supp. 635 [E. D. Mich., 1952], revd. on another ground and remanded 345 U. S. 242 [1952]; *Huntamer v. Coe*, 40 Wash. 2d 767, 246 P. 2d 489 [1952].)

* The debates in the federal convention upon the Constitution show that the term "ex post facto laws" was understood in a restricted sense relating to criminal cases only (*Bugajewitz v. Adams*, 228 U. S. 585 [1913]; see also, *Carpenter v. Pennsylvania*, 17 How. 463 [1855] and *Johannessen v. United States*, 225 U. S. 227 [1912]).

In the case at bar, too, a like result should ensue. The Act does not inflict punishment of any character, and if it be held that punishment is inflicted, it is clear that it is not imposed by reason of any past conduct. Recognizing the *continuing* criminal character of the Party, the Act provides for inability to assert in the future any rights, privileges and immunities in connection with transactions which take place subsequent to the effective date of the Act.

C. The Act does not violate the due process clause of the Fifth Amendment.

Despite the proscription set forth in the Act, there is nothing in the Act which deprives the Party of substantive due process when action is brought against it to terminate a right which it claims. It is precisely that which is taking place in the case at bar. The petitioners were afforded the opportunity at the hearings herein to present evidence in opposition to the termination of their rights. Neither the Industrial Commissioner, nor the Referee, nor the Appeal Board denied them the right to present their case. And the statute, itself, does not deny them that right.

So far as procedural due process is concerned, they received notice of the action of the Commissioner and they received notice of all proceedings to review the action of the Commissioner. They also had a full hearing.

It is submitted that there has been no violation of due process, either substantive* or procedural. It is further

* Petitioners assert (page 12 of their brief) that Section 3 is not "reasonably restricted to the evil with which it is said to deal" (citing *Butler v. Michigan*, 352 U. S. 380, 383 [1956]). But the evil at which the Act strikes is identical with the evil at which Congress struck in the Internal Security Act of 1950. We respectfully refer the Court to the treatment of this point in the respondent's brief in this Court in *Communist Party of the United States of America v. Subversive Activities Control Board*, October Term, 1960, No. 12, pp. 93-100.

submitted, however, assuming it be held that the statute does permit a denial of due process, that such denial would be proper, as consonant with a basic postulate which underlies the due process provision—movements seeking to crush freedom need not be tolerated. Mr. Chief Justice HUGHES, in *Principality of Monaco v. Mississippi*, 292 U. S. 313, 322 (1934), expressed the admonition that behind "the words of the constitutional provisions are postulates which limit and control."

The Courts, generally, have refused so to construe the Bill of Rights as to interfere with a reasonable legislative judgment of what laws are essential to national security. This is as it should be, for without the observance of the primary duty of self-preservation the civil liberties of the individual would be meaningless, since they must, under such circumstances, succumb to the totalitarian regime which must inevitably follow.

It is submitted that the Constitution should be construed in accordance with its purpose and *as one instrument*. Pre-occupation with or emphasis upon one part of the Constitution and the ignoring of another equally important part, so as to endanger national survival, constitutes an unrealistic and an improper method of applying constitutional standards and principles.

The greatest difficulty in recent years has been with respect to the situation where the right to assert infringement of civil liberties and the right of the government to resist violence seem to meet. There is required a deeper analysis of violence and non-violence and their relation to liberal democracy. In the *Dennis and Yates* cases, *supra*, this Court affirmed "the basic premise of our political system—that change is to be brought about by non-violent constitutional process." No government can assure a

"right" of violent overthrow; the guaranty and the right are mutually abhorrent. Certain political philosophers to the contrary notwithstanding, violent revolution exists *outside* rather than *inside* the law. Therefore, since the Communist Party is a conspiracy for the violent overthrow of the government, its advocacy of such violence colors its every act and withdraws it from the protection of the Bill of Rights.

D. The Act does not violate the First Amendment.*

The basic postulate, discussed above with respect to due process, is a limiting factor also upon the operation of the First Amendment (*Communist Party of United States v. Subversive Activities Control Board*, 223 F. 2d 531, 544 [App. D. C., 1954], revd. and remanded on another ground 351 U. S. 115 [1956]).

This Court has consistently held that the freedoms guaranteed by the First Amendment are not without limitation (*Debs v. United States*, 249 U. S. 211 [1919]; *Frohwerk v. United States*, 249 U. S. 204 [1919]; *Schenck v. United States*, 249 U. S. 47, 52 [1919]; *Schaefer v. United States*, 251 U. S. 466 [1920]; *Dennis v. United States*, 341 U. S. 494, 508 [1950]). It has, in fact, specifically held that the exercise of First Amendment freedoms may be restricted to protect other vital interests of the Government which are clearly necessary to the effectuation of proper Congressional power (*Schenck v. United States*,

* Although petitioners have not, in their brief herein, made a point of an alleged violation of the First Amendment, they did make the point in the Court of Appeals and they did obtain from the Court of Appeals an amendment of the remittitur to indicate that this point was presented to and necessarily passed upon by the Court of Appeals (Appendix B to Petition, p. 38). Accordingly, we address a few remarks to this point.

supra; *American Communications Association v. Bouds*, 339 U. S. 382, 394, 402-404 [1950]; *Dennis v. United States*, *supra*, pp. 509-510; see also *Barenblatt v. United States*, 360 U. S. 109, 126 [1959]).

POINT IV

The action of the respondent did not violate the Fourteenth Amendment; it did not deny the petitioners due process or equal protection of the laws.*

Insofar as the petitioners predicate a violation of the Fourteenth Amendment on an alleged lack of a hearing, they are faced with a record showing the contrary fact. As has been heretofore stated,† the Industrial Commissioner was under no burden, in establishing a *prima facie* case, of adducing evidence respecting the nature and character of the Communist Party; he could rely on the doctrine of judicial notice, or he could rely on the Congressional findings in the Communist Control Act,†† or both. However, it must be made clear that this was purely for

* The petitioners have no right to claim a violation of the 14th Amendment, under which consideration is given to the privileges or immunities of "citizens of the United States" (*Slaughterhouse Cases*, 16 Wall. 36 [1873]). Numerous decisions have held that only natural persons are to be considered citizens under this provision (*Hague v. C. I. O.*, 307 U. S. 496, 514 [1939]; *Western Turf Ass'n. v. Greenberg*, 204 U. S. 359 [1907]; see also, the concurring opinion of Mr. Justice BLACK in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, 144 [1951]).

† See *supra* pp. 3-4, 6-7.

†† Due process does not require that the Congressional findings in Section 2 of the Act as to the existence of a world or an American Communist movement and as to the character thereof be the subject of redetermination before the Referee or the Appeal Board. These are general *legislative* findings supporting the Act as a whole and may be

(Footnote continued on following page)

the purpose of establishing a *prima facie* case. The petitioners were free to submit any rebuttal evidence. The record clearly reveals that ample opportunity was afforded them to submit such evidence as they wished with respect to the nature and character of the Party but they failed to avail themselves of the proffered opportunity. They must be deemed to have waived this objection.

Insofar as the petitioners predicate a violation of due process on the lack of justification for the Commissioner's determination, conceding the criminal character of the petitioners, the respondent necessarily relies, in support thereof, on the provisions of the Communist Control Act which terminated their rights, privileges and immunities.

As to the alleged violation of the equal protection clause, a distinction must be drawn between an individual or an entity found guilty of a crime, but which is engaged in a legitimate business totally unrelated to the criminal acts, and an entity such as the Communist Party whose criminal character and activities so permeate its every fibre that it is not inherently or otherwise capable of engaging in any legal activities. Its criminal character and activities have a direct relationship to its inability to possess legal viability (*Sprott v. United States*, 20 Wall. 459, 464-465 [1874]).

(Footnote continued from preceding page)
 used, subject to evidentiary rebuttal, as the basis for a *prima facie* case supporting administrative action. This Court has specifically recognized the validity of such legislative findings (*Galvan v. Press*, 347 U. S. 522, 529 [1953]; *Carlson v. Landon*, 342 U. S. 524 [1952]). Even in the dissenting opinion of Mr. Justice FRANKFURTER in the last cited case, at page 565, he stated "The immigration authorities were by the Act relieved of proving—in order to make a *prima facie case*—that the Communist Party is an 'organization * * * that believes in, advises, advocates or teaches * * * the overthrow by force or violence of the Government.'"

Conclusion

Each of the petitioners' contentions have so consistently and repeatedly been decided by this Court adversely to such contentions that it cannot be said that there exists here a substantial federal or constitutional question.

We respectfully request this Court to deny the Petition for Writ of Certiorari.

Dated: Albany, New York, November 9, 1960.

Respectfully submitted,

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APPENDIX

Subversive Activities Control Act of 1950.

(50 U. S. Code § 781, *et seq.*, 64 Stat. 987, *et seq.*)

“§ 781. CONGRESSIONAL FINDING OF NECESSITY

As a result of evidence adduced before various committees of the Senate and House of Representatives, the Congress finds that—

(1) There exists a world Communist movement which, in its origins, its development, and its present practice, is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization.

(2) The establishment of a totalitarian dictatorship in any country results in the suppression of all opposition to the party in power, the subordination of the rights of individuals to the state, the denial of fundamental rights and liberties which are characteristic of a representative form of government, such as freedom of speech, of the press, of assembly, and of religious worship, and results in the maintenance of control over the people through fear, terrorism, and brutality.

(3) The system of government known as a totalitarian dictatorship is characterized by the existence of a single political party, organized on a dictatorial basis, and by substantial identity between such party and its policies and the government and governmental policies of the country in which it exists.

(4) The direction and control of the world Communist movement is vested in and exercised by the Communist dictatorship of a foreign country.

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(5) The Communist dictatorship of such foreign country, in exercising such direction and control and in furthering the purposes of the world Communist movement, establishes or causes the establishment of, and utilizes, in various countries, action organizations which are not free and independent organizations, but are sections of a world-wide Communist organization and are controlled, directed, and subject to the discipline of the Communist dictatorship of such foreign country.

(6) The Communist action organizations so established and utilized in various countries, acting under such control, direction, and discipline, endeavor to carry out the objectives of the world Communist movement by bringing about the overthrow of existing governments by any available means, including force if necessary, and setting up Communist totalitarian dictatorships which will be subservient to the most powerful existing Communist totalitarian dictatorship. Although such organizations usually designate themselves as political parties, they are in fact constituent elements of the world-wide Communist movement and promote the objectives of such movement by conspiratorial and coercive tactics, instead of through the democratic processes of a free elective system or through the freedom-preserving means employed by a political party which operates as an agency by which people govern themselves.

(7) In carrying on the activities referred to in paragraph (6) of this section, such Communist organizations in various countries are organized on a secret, conspiratorial basis and operate to a substantial extent through organizations, commonly known as 'Communist fronts', which in most instances are created and maintained, or used, in such manner as to conceal the facts as to their true character and purposes and their membership. One result of this method of operation is that such affiliated organizations are able to obtain financial and other support from persons who

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would not extend such support if they knew the true purposes of, and the actual nature of the control and influence exerted upon, such 'Communist fronts'.

(8) Due to the nature and scope of the world Communist movement, with the existence of affiliated constituent elements working toward common objectives in various countries of the world, travel of Communist members, representatives, and agents from country to country facilitates communication and is a prerequisite for the carrying on of activities to further the purposes of the Communist movement.

(9) In the United States those individuals who knowingly and willfully participate in the world Communist movement, when they so participate, in effect repudiate their allegiance to the United States, and in effect transfer their allegiance to the foreign country in which is vested the direction and control of the world Communist movement.

(10) In pursuance of communism's stated objectives, the most powerful existing Communist dictatorship has, by the methods referred to above, already caused the establishment in numerous foreign countries of Communist totalitarian dictatorships, and threatens to establish similar dictatorships in still other countries.

(11) The agents of communism have devised clever and ruthless espionage and sabotage tactics which are carried out in many instances in form or manner successfully evasive of existing law.

(12) The Communist network in the United States is inspired and controlled in large part by foreign agents who are sent into the United States ostensibly as attachés of foreign legations, affiliates of international organizations, members of trading commissions, and in similar capacities, but who use their diplomatic or semidiplomatic status as a shield behind which to engage in activities prejudicial to the public security.

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(13) There are, under our present immigration laws, numerous aliens who have been found to be deportable, many of whom are in the subversive, criminal, or immoral classes who are free to roam the country at will without supervision or control.

(14) One device for infiltration by Communists is by procuring naturalization for disloyal aliens who use their citizenship as a badge for admission into the fabric of our society.

(15) The Communist movement in the United States is an organization numbering thousands of adherents, rigidly and ruthlessly disciplined. Awaiting and seeking to advance a moment when the United States may be so far extended by foreign engagements, so far divided in counsel, or so far in industrial or financial straits, that overthrow of the Government of the United States by force and violence may seem possible of achievement, it seeks converts far and wide by an extensive system of schooling and indoctrination. Such preparations by Communist organizations in other countries have aided in supplanting existing governments. The Communist organization in the United States, pursuing its stated objectives, the recent successes of Communist methods in other countries, and the nature and control of the world Communist movement itself, present a clear and present danger to the security of the United States and to the existence of free American institutions, and make it necessary that Congress, in order to provide for the common defense, to preserve the sovereignty of the United States as an independent nation, and to guarantee to each State a republican form of government, enact appropriate legislation recognizing the existence of such world-wide conspiracy and designed to prevent it from accomplishing its purpose in the United States."

*Appendix**Communist Control Act of 1954.*(50 U. S. Code §§ 841, *et seq.*; 68 Stat. 775 *et seq.*)**"§ 841. FINDINGS AND DECLARATIONS OF FACT**

The Congress hereby finds and declares that the Communist Party of the United States, although purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the Government of the United States. It constitutes an authoritarian dictatorship within a republic, demanding for itself the rights and privileges accorded to political parties, but denying to all others the liberties guaranteed by the Constitution. Unlike political parties, which evolve their policies and programs through public means, by the reconciliation of a wide variety of individual views, and submit those policies and programs to the electorate at large for approval or disapproval, the policies and programs of the Communist Party are secretly prescribed for it by the foreign leaders of the world Communist movement. Its members have no part in determining its goals, and are not permitted to voice dissent to party objectives. Unlike members of political parties, members of the Communist Party are recruited for indoctrination with respect to its objectives and methods, and are organized, instructed, and disciplined to carry into action slavishly the assignments given them by their hierachal chieftains. Unlike political parties, the Communist Party acknowledges no constitutional or statutory limitations upon its conduct or upon that of its members. The Communist Party is relatively small numerically, and gives scant indication of capacity ever to attain its ends by lawful political means. The peril inherent in its operation arises not from its numbers, but from its failure to acknowledge any limitation as to the nature of its activities, and its dedication to the proposition that the present constitutional Government of the United States ultimately must be brought to ruin by any available means, including resort to force and violence.

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Holding that doctrine, its role as the agency of a hostile foreign power renders its existence a clear present and continuing danger to the security of the United States. It is the means whereby individuals are seduced into the service of the world Communist movement, trained to do its bidding, and directed and controlled in the conspiratorial performance of their revolutionary services. Therefore, the Communist Party should be outlawed.

§ 842. PROSCRIPTION OF COMMUNIST PARTY, ITS SUCCESSORS, AND SUBSIDIARY ORGANIZATIONS

The Communist Party of the United States, or any successors of such party regardless of the assumed name, whose object or purpose is to overthrow the Government of the United States, or the government of any State, Territory, District, or possession thereof, or the government of any political subdivision therein by force and violence, are not entitled to any of the rights, privileges, and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof; and whatever rights, privileges, and immunities which have heretofore been granted to said party or any subsidiary organization by reason of the laws of the United States or any political subdivision thereof, are hereby terminated: *Provided, however,* That nothing in this section shall be construed as amending the Internal Security Act of 1950, as amended.

§ 843. APPLICATION OF INTERNAL SECURITY ACT OF 1950 TO MEMBERS OF COMMUNIST PARTY AND OTHER SUBVERSIVE ORGANIZATIONS; DEFINITION

Whoever knowingly and willfully becomes or remains a member of (1) the Communist Party, or (2) any other organization having for one of its purposes or objectives the establishment, control, conduct, seizure, or overthrow of the Government of the United States, or the government of any State or political sub-

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division thereof, by the use of force or violence, with knowledge of the purpose or objective of such organization shall be subject to all the provisions and penalties of the Internal Security Act of 1950, as amended, as a member of a 'Communist-action' organization.

(b) For the purposes of this section, the term 'Communist Party' means the organization now known as the Communist Party of the United States of America, the Communist Party of any State or subdivision thereof, and any unit or subdivision of any such organization, whether or not any change is hereafter made in the name hereof.

§ 844. SAME; DETERMINATION BY JURY OF MEMBERSHIP, PARTICIPATION, OR KNOWLEDGE OF PURPOSE

In determining membership or participation in the Communist Party or any other organization defined in this Act, or knowledge of the purpose or objective of such party or organization, the jury, under instructions from the court, shall consider evidence, if presented, as to whether the accused person:

- (1) Has been listed to his knowledge as a member in any book or any of the lists, records, correspondence, or any other document of the organization;
- (2) Has made financial contribution to the organization in dues, assessments, loans, or in any other form;
- (3) Has made himself subject to the discipline of the organization in any form whatsoever;
- (4) Has executed orders, plans, or directives of any kind of the organization;
- (5) Has acted as an agent, courier, messenger, correspondent, organizer, or in any other capacity in behalf of the organization;
- (6) Has conferred with officers or other members of the organization in behalf of any plan or enterprise of the organization;

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- (7) Has been accepted to his knowledge as an officer or member of the organization or as one to be called upon for services by other officers or members of the organization;
- (8) Has written, spoken or in any other way communicated by signal, semaphore, sign, or in any other form of communication orders, directives, or plans of the organization;
- (9) Has prepared documents, pamphlets, leaflets, books, or any other type of publication in behalf of the objectives and purposes of the organization;
- (10) Has mailed, shipped, circulated, distributed, delivered, or in any other way sent or delivered to others material or propaganda of any kind in behalf of the organization;
- (11) Has advised, counseled or in any other way imparted information, suggestions, recommendations to officers or members of the organization or to anyone else in behalf of the objectives of the organization;
- (12) Has indicated by word, action, conduct, writing or in any other way a willingness to carry out in any manner and to any degree the plans, designs, objectives, or purposes of the organization;
- (13) Has in any other way participated in the activities, planning, actions, objectives, or purposes of the organization;
- (14) The enumeration of the above subjects of evidence on membership or participation in the Communist Party or any other organization as above defined, shall not limit the inquiry into and consideration of any other subject of evidence on membership and participation as herein stated."

Feinberg Law (L. 1949, ch. 360, § 1)

"The legislature hereby finds and declares that there is common report that members of subversive

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groups, and particularly of the communist party and certain of its affiliated organizations, have infiltrated into public employment in the public schools of the state. This has occurred and continues despite the existence of statutes designed to prevent the appointment to or the retention in employment in public office and particularly in the public schools of the state of members of any organization which teaches or advocates that the government of the United States or of any state or of any political subdivision thereof shall be overthrown by force or violence or by any unlawful means. * * * The legislature further finds and declares that in order to protect the children in our state from such subversive influence it is essential that the laws prohibiting persons who are members of subversive groups, such as the communist party and its affiliated organizations, from obtaining or retaining employment in the public schools, be rigorously enforced. * * *

Report of (United States) House of Representatives Committee on Un-American Activities relative to the Internal Security Act of 1950 (House Report No. 2980, dated August 22, 1950; U. S. Code Congressional and Administrative News 1950, p. 3886)

"Necessity For Legislation

The need for legislation to control Communist Activities in the United States cannot be questioned.

Over 10 years of investigation by the Committee on Un-American Activities and by its predecessor committee has established (1) that the Communist movement in the United States is foreign-controlled; (2) that its ultimate objective with respect to the United States is to overthrow our free American institution in favor of a Communist totalitarian dictatorship to be controlled from abroad; (3) that its activities are carried on by secret and conspiratorial methods; and

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(4) that its activities, both because of the alarming march of Communist forces abroad and because of the scope and nature of Communist activities here in the United States, constitute an immediate and powerful threat to the security of the United States and to the American way of life.

The Communist program of conquest through treachery, deceit, infiltration, espionage, sabotage, corruption, and terrorism has been carried out in country after country and is an ever-growing threat to the national security of this and other countries. There is ample evidence that one of the primary objectives of the world Communist movement, directed from within the most powerful existing Communist totalitarian dictatorship, is to repeat this pattern in the United States.

There is incontrovertible evidence of the fact that the Communist Party of the United States is dominated by such totalitarian dictatorship and that it is one of the principal instrumentalities used by the world Communist movement, in its ruthless and tireless endeavor to advance the world march of communism.

The findings which support these conclusions, and the vast quantity of evidence on which they are based, are set forth in detail in the numerous reports which this committee and its predecessors have printed and circulated. Corroboration has been supplied by independent and exhaustive research by other committees of Congress.

Concern over this threat is not limited to the legislative branch of our Government. At the present time 30 of the 70 major countries in the world have outlawed the Communist Party. Many other countries have adopted various legislative decrees against communism, and since 1947 the trend has been toward declaring all Communist activities illegal. Panama was the latest to take such action. This action came in April of this year. ***

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Concern over the Communist threat has not been overlooked by the different State legislatures. At the present time 33 States have laws against the displaying of the 'Red' flag; 12 States have criminal anarchy laws; 16 have criminal syndicalism laws; 22 have sedition laws; 16 have laws against the Communist Party candidates appearing on the election ballot; 19 States exclude Communists from public employment; 28 States require loyalty oaths of all employees; and 20 States require teachers to take loyalty oaths."